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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 521

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., a corporation,

Petitioner-Appellant,

vs.

SAMUEL B. STEWART, CARL CHAMBERS and RAY SMITH, constituting the State Tax Commission of the State of Oregon,

Defendants-Appellees.

JURISDICTIONAL STATEMENT

On Appeal from the Supreme Court of the State of Oregon.

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In the Supreme Court
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OCTOBER TERM, 1960

No.

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., a corporation,

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SAMUEL B. STEWART, CARL CHAMBERS and RAY SMITH, constituting the State Tax Commission of the State of Oregon,

Defendants-Appellees,

JURISDICTIONAL STATEMENT

On Appeal from the Supreme Court of the State of Oregon.

A. Citations to Opinions Below

1) The Opinion of the Supreme Court of the State of Oregon, review of which is sought, is printed on pages A12 to A25 of the Appendix, infra. This Opinion is officially reported in 70 Or. Adv. Sh. 1647 and unofficially in 353 P.2d 541.

2) Findings of Fact, Conclusion of Law, Judgment and Decree, dated September 17, 1959, of the trial

court, being the Circuit Court of the State of Oregon for the County of Multnomah, are printed on pages A7 to A11 of the Appendix, infra.

3) Opinion and Order No. I-57-5, dated February 14, 1957, of the State Tax Commission of the State of Oregon is printed on pages A1 to A6 of the Appendix, infra.

B. Statement of Grounds on Which Jurisdiction is Invoked.

1) This proceeding commenced as an appeal by plaintiff-appellant, hereinafter called plaintiff, to the Circuit Court of the State of Oregon for the County of Multnomah from Opinion and Order No. I-57-5, dated February 14, 1957, of the State Tax Commission of the State of Oregon, which Opinion and Order affirmed a previous assessment of taxes on the privilege of doing business imposed upon plaintiff by subordinate state tax officials, thus affirming the imposition of deficiency assessments and the denial of claims of refund for the years 1950, 1951 and 1952. The tax was levied pursuant to Section 110-1506, O.C.L.A. (Oregon Compiled Laws Annotated), as amended by Chapter 280, Oregon Laws, 1949, now codified as ORS (Oregon Revised Statutes) 317.070.

After a hearing on said appeal, the Circuit Court of the State of Oregon for the County of Multnomah, on September 18, 1959, entered its Findings of Fact, Conclusions of Law, Judgment and Decree (A7 to A11, infra.), holding that the taxing formula of the defendants was an arbitrary and unreasonable measure of

plaintiff's privilege of doing intrastate business within the State of Oregon and was, therefore, unconstitutional under Article I, Section 8, Clause 3, of the Constitution of the United States since it purported to include all of plaintiff's business, both interstate and intrastate within the State of Oregon as the measure of the value of taxpayer's privilege of doing intrastate business within the State of Oregon. The proper formula for the allocation of that portion of plaintiff's total net income subject to taxation by the State of Oregon for the privilege of doing business was held to be the fraction resulting from utilizing plaintiff's revenue miles in intrastate commerce within the State of Oregon as the numerator and plaintiff's revenue miles throughout its system as the denominator of the allocation fraction.

2) Thereafter, defendants filed on November 3, 1959, their Notice of Appeal to the Supreme Court of the State of Oregon, argument on which appeal was heard on May 11, 1960. On June 15, 1960, the Supreme Court of the State of Oregon filed its Opinion (A12 to A25, infra), reversing the judgment of the trial court. On July 1, 1960, plaintiff timely filed a Petition for Re-Hearing. The Petition for Rehearing was denied on August 5, 1960 (A28, infra). Notice of Appeal to the Supreme Court of the United States was filed simultaneously in the Supreme Court of the State of Oregon and in the Circuit Court of the State of Oregon for the County of Multnomah on September 15, 1960 (A29-31, infra). A duplicate notice was duly served upon counsel for defendants.

3) The statutory provisions believed to confer jurisdiction on the Supreme Court of the United States are 28 U.S.C. §1257(2), 28 U.S.C. §2101(c), and 28 U.S.C. §2103.

4) Cases believed to sustain the jurisdiction of this Court:

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S. Ct. 106, 66 L. ed. 239 (1921).

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S. Ct. 396, 98 L. ed. 583 (1954).

Railway Express Agency v. Virginia, 347 U.S. 359, 74 S. Ct. 558, 98 L. ed. 757 (1954).

Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L. ed. 573 (1951).

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S. Ct 357, 3 L. ed. 2d 421 (1959).

5) The validity of the application to plaintiff by defendants of Section 110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949 (now ORS 317.070), is questioned under the Commerce Clause of the Federal Constitution. The verbatim text of the portion of said statute relevant to this appeal is as follows:

> "Every mercantile, manufacturing and business corporation doing or authorized to do business within this state, except as hereinafter provided, shall annually pay to this state, for the privilege of carrying on or doing business by it within this state, an excise tax according to or measured by its net income, as herein defined, to be computed in the manner hereinafter provided, at the rate of five per cent upon the basis of its net income for the year 1930, and at the rate of eight per cent upon the basis of its net income for the year 1931 and for each year thereafter. * * * "

The terms "excise tax" and "doing business" were defined for the purposes of the statute in Section 110-1502, O.C.L.A., as amended by Chapter 172, Oregon Laws, 1947 (now ORS 317.010 (8) (9)), the verbatim text of said portions of the above statutes being as follows:

> "Sec. 110-1502. For the purpose of this act and unless otherwise required by the context: * * *
>
> "(5) The term 'excise tax,' as herein used, means a tax measured by or according to net income imposed upon national banking associations, all other banks, and financial, mercantile, manufacturing and business corporations for the privilege of carrying on or doing business in this state.
>
> "(6) The term 'doing business,' as herein used, means any transaction or transactions in the course of its activities conducted within the state by a national banking association, or any other corporation."

The authority of the State Tax Commission to allocate income in administering the above taxation measure is set forth in § 110-1507, O.C.L.A. (now ORS 317.180):

> "(a) If the gross income of a corporation is derived from business done both within and without the state, the determination of net income shall be based upon the business done within the state, and the commission shall have power to permit or require either the segregated method of reporting or the apportionment method of reporting, under rules and regulations adopted by the commission, so as fairly and accurately to reflect the net income of the business done within the state.
>
> "(b) The provisions of subsection (a) dealing with the apportionment of income earned from sources both within and without the state of Oregon are designed to allocate to the state of Oregon on a

fair and equitable basis a proportion of such income earned from sources both within and without the state. Any taxpayer may submit an alternative basis of apportionment with respect to its own income and explain that basis in full in its return. If approved by the tax commission that method will be accepted as the basis of allocation."

It is also contended by plaintiff that the imposition of the tax upon plaintiff by defendants under the above statutes violates the equal protection and due process clauses of Section 1 of the 14th Amendment to Constitution of the United States.

C. Questions Presented by the Appeal.

1. Did the Supreme Court of the State of Oregon err in holding that the excise tax for the privilege of doing business within the State under Section 110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949, had not been applied to plaintiff in an unconstitutional manner in violation of the "commerce clause," Article I, Section 8, Clause 3, of the Constitution of the United States, by its imposition by defendants upon all business, both interstate and intrastate, done by plaintiff, a foreign corporation, within the State of Oregon?

2. Did the Supreme Court of the State of Oregon err in failing to find that the measure of the excise tax authorized by Section 110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949 (ORS 317.070), imposed upon plaintiff, a foreign corporation, and including all of plaintiff's business, both interstate and intrastate, as a measure of the taxable privilege of conducting intrastate business within the State of Oregon

was an arbitrary and unreasonable measurement and, therefore, violated the "due process" clause of Section 1 of the 14th Amendment of the Constitution of the United States?

3. Did the Supreme Court of the State of Oregon err in failing to find that the measure of the excise tax authorized by Section 110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949 (ORS 317.070), imposed by defendants upon plaintiff, a foreign corporation, and including all of plaintiff's business, both interstate and intrastate, within the State of Oregon, while not being applied to any of the business of plaintiff's competitors, being foreign corporations, doing solely interstate business within the State of Oregon, was an arbitrary and unreasonable classification, and, therefore, violated the "equal protection" clause of Section 1 of the 14th Amendment to the Constitution of the United States?

D. Concise Statement of the Case

This proceeding commenced as an appeal by plaintiff to the Oregon State Tax Commission from an allocation formula imposed upon plaintiff by the subordinate state tax officials. The State Tax Commission of the State of Oregon rejected said appeal (A1 to A6, infra) but its Opinion and Order was reversed upon appeal by plaintiff to the Circuit Court of the State of Oregon for the County of Multnomah, which entered its decree (A7 to A11, infra) holding that the apportionment formula in question, and thus the application of the tax to plaintiff, violated Article I, Section 8, Clause 3, the "commerce clause"

of the Constitution of the United States and entered judgment in favor of plaintiff. This judgment was then reversed by the Supreme Court of the State of Oregon (A12 to A31, infra) from which determination this appeal is taken.

During the period in issue, plaintiff taxpayer was doing business as a motor vehicle common carrier primarily in the States of Oregon and California, in both interstate and intrastate commerce. It was also qualified to haul into Nevada but said operations were a minor portion of its business activity and are not here involved. It owned no real property in Oregon, except some land at Ashland, Oregon, with a value of less than $500.00.

It operated in interstate commerce in Oregon as a regular route, scheduled line-haul common carrier of freight between Portland, Oregon, and San Francisco, California and way points. Interstate operations are deemed to be those in which the particular freight shipment commenced in Oregon and terminated in California or commenced in California and terminated in Oregon. Its authority to haul freight in interstate commerce was governed entirely by the Interstate Commerce Commission.

It operated in intrastate commerce in Oregon as a regular route, scheduled line-haul common carrier of freight between Portland, Oregon, and other points in Western Oregon. Taxpayer's hauling of freight in intrastate commerce was under the authority and control of the Public Utilities Commission of the State of Ore-

gon. Taxpayer did not perform any local drayage as such. It did perform pick-up and delivery service incident to its line-haul operations.

The two governmental regulatory systems are independent and the scope of the operating authority granted by each is not necessarily co-extensive.

The Corporation Excise Tax for the years in question was an excise levied on the privilege, as defined by statute, of carrying on or doing business by the taxpayer within the State of Oregon. It does not purport to be an ad valorem real or personal property tax, a corporation franchise tax, a tax to pay for the use of the highways, or to pay for the cost of regulation of the carrier, either by the Motor Vehicle Department or by the Public Utilities Commission, there being other taxes and license fees covering these matters. It was economically beneficial, but not necessary, for taxpayer to carry on its operation in both interstate and intrastate commerce. Taxpayer was able to distinguish its interstate and intrastate commerce by the use of revenue or line-haul miles, a measure accepted by the State Tax Commission as an accurate means of segregating freight transportation by taxpayer in interstate and intrastate commerce (see A3, infra). These mileage records of taxpayer have been audited by other authorities and their accuracy accepted.

The revenue miles traveled by plaintiff for the years in issue and the allocation fractions based thereon are as follows:

	1950	1951	1952
Oregon intrastate miles	778,185	870,600	907,627
Oregon interstate miles	648,414	686,217	697,622
Total Oregon miles	1,426,599	1,556,817	1,605,249
Total miles everywhere	3,984,590	4,179,137	4,198,300
Oregon intrastate miles divided by total miles everywhere (plaintiff taxpayer's basis for allocation)	.1953	.2083	.2162
Total Oregon miles divided by total miles everywhere (defendant tax commission's allocation basis)	.3580	.3725	.3824

The allocation formula used by the State Tax Commission to apportion the net income of the corporation subject to tax by the State of Oregon for the privilege of doing business within the state was based upon a fractional multiplier resulting from using all revenue miles of taxpayer in Oregon, including revenue miles for intrastate and interstate commerce, as the numerator, and all revenue miles travelled in plaintiff's system as the denominator.

Taxpayer contends that the privilege which the State of Oregon purports to tax, and which it is constitutionally limited to tax, is the privilege of doing intrastate business within the State of Oregon. Since taxpayer is able to establish an accurate and recognized formula, i.e. revenue miles, to distinguish its two types of business activity within the state (see A3 and A22, infra), the proper fractional multiplier should be that resulting from using revenue miles in intrastate com-

merce of taxpayer in Oregon as the numerator and all revenue miles traveled in plaintiff's system as denominator. The opposing calculations of tax based on the differing allocation formulas are presented in detail in the Statement of Stipulated Facts in the Transcript of Record.

How the Federal Question Is Presented

Taxpayer, in its original claim filed with the State Tax Commission of the State of Oregon, contended that certain deficiency assessments should be abated and refund claims should be allowed on the grounds that the formula of the State Tax Commission, as above set forth, for the allocation of taxpayer's income to the State of Oregon, violated Article I, Section 8, Clause 3, of the so-called "Commerce Clause," of the Constitution of the United States, and violated the "Equal Protection" and "Due Process" Clauses of Section 1 of the 14th Amendment. Thereafter, these same objections were presented by plaintiff on the occasion of its formal hearing before the State Tax Commission as indicated in Opinion and Order I-57-5, dated February 14, 1957 (A2, infra), and in its appeal to the Circuit Court of the State of Oregon for Multnomah County from the Opinion and Order of the State Tax Commission (see Complaint, pages 2-18 of Record on Appeal). These issues were considered in defendants' appeal to the Oregon Supreme Court and are now submitted to this Honorable Court by plaintiff.

E. A Substantial Federal Question is Involved

The Corporation Excise Tax levied by the State of Oregon for the privilege of doing business within the state, is unconstitutional in its application to plaintiff taxpayer, in that the State Tax Commission arbitrarily and patently purports to levy a tax upon the privilege of doing interstate business within the state, which is a privilege which the state may neither grant nor deny under the Commerce Clause of the Constitution of the United States.

A significant and substantial federal question is involved in this appeal for the reason that the facts of this case bring into sharp focus a hiatus in the decisions of the Supreme Court of the United States in the field of state taxation of interstate commerce, namely, does the carrying on of *any* intrastate commerce by a taxpayer subject *all* of its business operations within the state, both in interstate commerce and in intrastate commerce, to a privilege tax levied by the state for the privilege of doing business within the state or must the measure of the tax, in some reasonable way, purport to reach only the privilege of doing intrastate business within the state, which is the only privilege subject to taxation by the state.

In the leading case of Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, this Court held that a foreign corporation doing business solely in interstate commerce within the taxing state as a motor vehicle common carrier was not subject to a privilege tax levied upon the net income of the corporation, measured solely,

by net income derived from sources within the taxing state. The pick-up and delivery activities of the taxpayer within the state were held to be a part of the interstate movement of goods by the taxpayer and, therefore, did not constitute a local incident sufficient to bring the taxpayer within the taxing authority of the state. The majority opinion then stated, 340 U.S. at 609-610:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, *a state may tax the privilege of carrying on intrastate business* and, within reasonable limits, may compute the amount of the charge by applying the tax rate *to a fair proportion* of the taxpayer's business done within the state, including both interstate and intrastate." (Emphasis supplied)

The minority opinion of this same case, 340 U.S. at 610-611, stated as follows:

> "Hence, if appellant had been engaged in one iota of activity which the court would have been willing to call 'intrastate', Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the state, even though derived from interstate commerce."

The opinion of the Oregon Supreme Court states (A22, infra) that there is nothing in the majority opinion in Spector Motor Service, Inc. v. O'Connor, supra, or any later decision of the United States Supreme Court, which says that the foregoing statement in the dissenting opinion is not correct. Plaintiff disagrees.

Plaintiff contends that the statement in the majority opinion, although dictum, does state that the minority opinion is incorrect. Plaintiff contends that the statement in the majority opinion is made to avoid the restrictive burdens placed upon attempts by the state to tax commerce by certain earlier decisions of the United States Supreme Court. For example, see

Sprout v. City of South Bend, 277 U.S. 163, 171, 48 S. Ct. 502, 504, 72 L. ed. 833, 837 (1928),

East Ohio Gas Company v. Tax Commission of Ohio, 283 U.S. 465, 470, 51 S. Ct. 499, 500, 75 L. ed. 1171, 1174 (1931), and

Cooney v. Mountain States Tel & Tel Co., 294 U.S. 384, 393, 55 S. Ct. 477, 482, 79 L. ed. 934, 942 (1935).

These cases held that if the tax imposed by the State upon the taxpayer for the privilege of doing business rested in any degree upon or was increased in any way by the activities in interstate commerce, the *entire measure* was invalidated. The burden was placed upon the state to establish that its tax did not include *any* interstate commerce factors. It is clear that as our economy and business between the states became more complex and the states' needs for tax revenue increased, the language of these cases carried to their logical conclusion would have imposed an intolerable burden upon the taxing authorities of a state charged with apportioning privilege taxes between the interstate and intrastate business of a taxpayer.

The reasonable and proper interpretation of the dictum contained in the majority opinion in Spector Motor Service v. O'Connor, supra, is the recognition that inter-

state factors may be included in the tax formula applied by the state to measure an excise tax upon the privilege of conducting intrastate business within the state *but* the tax may still be levied only upon the intrastate business. This Court has held that the privilege of doing business in interstate commerce is a privilege which the state may neither grant nor deny.

> Castle v. Hayes Freight Lines, Inc., 348 U.S. 61, 75 S. Ct. 191, 99 L. ed. 68 (1954).

From this authority it would follow that the measure of the tax must be reasonably co-extensive with the extent of the privilege subject to taxation. It cannot arbitrarily and patently include all of plaintiff's business as the measure of the intrastate privilege.

However, the dictum from Spector Motor Service, Inc. v. O'Connor, supra, remains unexplained by this Honorable Court despite the importance of this problem on a nation-wide basis in marking out the relationships between the power of the state to tax and the protections afforded by the commerce, due process and equal protection clauses of the Constitution of the United States and the 14th Amendment.

The hiatus resulting from the conflicting dictum in the majority and minority opinions in Spector Motor Service, Inc. v. O'Connor, supra, has caused disagreement in other state courts in this country, for example:

> American Barge Line Co. v. Koontz (1951), 136 W. Va. 747, 68 S.E. 2d 56 (Measure of tax limited to intrastate commerce on barge line).
>
> Norfolk & Western Railway Co. v. Field (1957), 143 W.Va. 219, 100 S.E. 2d 796 (measure ap-

parently permitted to include interstate commerce portion of railroad line).

Gartland S. S. Corp. v. Michigan Corporation & Securities Commission (1954), 339 Mich. 661 64 N.W. 2d 886 (Interstate traffic excluded in measure of privilege tax).

Panhandle Eastern Pipeline Co. v. Michigan Corporation & Securities Commission (1956), 346 Mich. 50, 77 N.W. 2d 249 (Interstate traffic must be excluded in measure of privilege tax).

Duluth, South Shore & Atlantic Railroad Co. v. Michigan Corporation & Securities Commission (1958), 353 Mich. 636, 92 N.W. 2d 22; cert. den. 359 U.S. 310, 79 S. Ct. 876, 3 L. ed. 2d 831 (1959) (Interstate trackage of railroad included in measure of privilege tax).

National Schools v. Los Angeles (1955), 135 Cal App 2d 311, 289 P.2d 151; cert. den. 350 U.S. 968, 100 L. ed. 841, 76 S. Ct. 439 (1956) (Privilege tax limited to income from intrastate business).

The facts of the present case bring this important constitutional issue into sharp focus, unencumbered by collateral issues. Taxpayer utilized a measure of undisputed accuracy to distinguish between its interstate commerce and intrastate commerce activities. The State Tax Commission used the measure but imposed the tax on all business of taxpayer within the state in both interstate and intrastate commerce. Plaintiff taxpayer contended that where an accurate measure existed to distinguish between its activities in interstate commerce and intrastate commerce, that measure must be followed in allocating a state tax on the privilege of engaging in business within the state. The trial court agreed with the taxpayer.

The Oregon Supreme Court recognized that, for its purposes, interstate and intrastate miles were fully segregated, (A15) but reversed the trial court on the authority of the dictum found in the minority opinion of this court in Spector Motor Service, Inc. v. O'Connor, supra. Taxpayer respectfully urges that it is in the national interest that the dictum in the majority opinion in Spector Motor Service, Inc. v. O'Connor should be amplified and explained and that the instant appeal is the appropriate vehicle by which this may be accomplished.

Another important aspect of this substantial federal question involving interstate commerce should also be considered. In reversing the trial court, the Supreme Court of the State of Oregon characterized the difference between a tax on the privilege of doing business as set forth in §110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949 (ORS 317.070) and measured by net income and a tax levied directly on net income as merely a matter of labels attached to the cases by the United States Supreme Court (see A19, infra). The decision of the Supreme Court of Oregon rested in part upon the erroneous premise that there is no essential difference in the formula application between a tax *on* net income and a tax on the privilege of doing business *measured* by net income. This determination entirely failed to consider the different operating incidences of the two forms of taxation and the legal consequences flowing therefrom as established by this Court in the following leading cases.

Spector Motor Service, Inc. v. O'Connor, 340 U.S.

602 (privilege tax on the net income of a foreign corporation motor carrier for the privilege of doing business within the state; invalidated in the case of a foreign corporation taxpayer engaged solely in interstate business.)

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (tax on net income of a foreign corporation doing business within the state; tax sustained in the case of a foreign corporation taxpayer engaged solely in interstate commerce.)

The tax statute in the instant case is identical to that considered in Spector Motor Service v. O'Connor, supra, but was treated by the Oregon Supreme Court in the same manner as a tax on net income as determined in Northwestern States Portland Cement Co. v. Minnesota, supra, the difference between the two being described as merely a matter of labels imposed by the United States Supreme Court (A19, infra). This departure from the authority of this Honorable Court itself raises a substantial federal question.

Plaintiff contends that the operating incidence of the tax determines the legal consequences flowing from it. The label is imposed by the legislature of the state. This label may or may not reflect the true character of the tax. This Honorable Court may, after its examination of the nature of the tax, accept the label placed upon it by the state, or it may re-characterize it after an analysis of its effect, or operating incidence. Thus, the cavalier dismissal of the important review function of this Honorable Court and the treatment of a tax which is clearly and demonstrably a tax on the privilege of doing business measured by net income as being in

the same category as a tax on net income constitute substantial federal questions for review by this Court. The decision of the Oregon Supreme Court in this regard is a complete departure from the authority of this Court.

The preceding discussion has been devoted primarily to issues concerning the commerce clause. When the state purports to levy a privilege tax for the privilege of doing business within the state and its power and authority are limited to control over intrastate commerce, it is an arbitrary and unreasonable act to measure the extent of that privilege by a measure of the tax which patently and openly includes all interstate business activity of the plaintiff taxpayer in the allocation of the tax and is, therefore, violative of the "due process" clause of the 14th Amendment.

During the period of this tax all but one of plaintiff's competitors were operating solely in interstate commerce and were entirely free from the privilege tax of the State of Oregon. Plaintiff respectfully contends that it is a violation of the "equal protection of the laws" clause of the 14th Amendment to classify plaintiff's operations as being subject in their entirety in Oregon to the privilege tax in issue while competitors doing solely interstate business escaped taxation entirely. These issues present further substantial federal questions.

CONCLUSION

Appellant respectfully asks that plenary consideration with briefs on the merits and oral argument be granted in this case.

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APPENDIX

1. Opinion and Order, I-57-5, dated February 14, 1957.

STATE OF OREGON
STATE TAX COMMISSION

In the Matter of the Appeal of OREGON - NEVADA - CALIFORNIA FAST FREIGHT, INC. from notices of deficiency and assessment for the years 1950, 1951 and 1952 and from the denial of refunds for the same years.	OPINION AND ORDER No. I-57-5

This matter came before the Commission upon the petition of Oregon-Nevada-California Fast Freight, Inc. appealing and requesting an abatement and refund of taxes assessed and collected for the years 1950, 1951 and 1952. The taxpayer is a California corporation subject to the provisions of ORS 317.070 providing for the imposition of an excise tax on corporations doing business in the state. Taxpayer filed its 1950, 1951 and 1952 returns respectively on June 4, 1951, May 19, 1952 and April 15, 1953. The 1950 and 1951 returns were filed pursuant to extensions of time as provided in ORS Chapter 317. Notices of deficiency and proposed assessment were issued on June 2, 1954 and were amended on September 9, 1955. Also on September 9, 1955 notices of deficiency and assessment were issued. Refund claims were first filed in all three years on February 23, 1955, amended refund claims were filed on October 6,

1955 and a recomputation was submitted on the amended claims on January 18, 1956.

The hearing on the taxpayer's appeal took place at 2 p.m. on January 24, 1956 in Room 101, State Office Building, Salem, Oregon. Commissioners Stewart, Smith and Chambers presided at the hearing. The taxpayer was represented by Mr. E. A. Gritsch, Vice President and District Manager for Oregon and by Ferris Boothe, Attorney at Law. The State of Oregon was represented by Mr. Charles Kerper, Auditor and Donald J. Griswold, Assistant Attorney General. The Commission listened to the testimony of Mr. Gritsch, which testimony was for the purpose of showing that the figures which had been used by the taxpayer were accurate. The legal issue raised by the appeal is whether or not a taxpayer doing both intrastate and interstate business in this state may segregate the intrastate activities and use the activities in the numerator in the apportionment factors and exclude therefrom the interstate activities while including the interstate activities in the denominator of the factors. After hearing brief argument on the legal issues by counsel for the appellant and counsel for the state, the Commission upon motion and unanimous passage instructed counsel for both parties to prepare briefs which were to be submitted to the Commission for consideration. Pursuant to this direction, taxpayer's counsel filed a brief which was answered by counsel for the state with a reply brief being filed by taxpayer's counsel.

The Commission now being fully advised makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I

The appellant-taxpayer is a California corporation doing business in the State of Oregon as a motor vehicle common carrier pursuant to state and federal authority.

II

Goods are transported between points in Oregon in intrastate commerce and between points in Oregon and Northern California in interstate commerce.

III

Terminals are operated by the motor carrier both in California and Oregon, with one terminal located in Reno, Nevada.

IV

The taxpayer's tax was computed by the state by the use of a fraction which was computed by using the miles traveled in Oregon as a numerator and all miles traveled by the system as a denominator. The fraction thus determined was applied to the taxpayer's total net income to determine the portion of the income attributable to taxpayer's Oregon operations.

V

Taxpayer concedes that mileage is a valid measure of its activities in this state but contends that the measure of the tax should consider only intrastate miles traveled in Oregon rather than both intrastate and interstate miles as was the case with the fraction used in the Tax Commission's notices of deficiency and assessment

VI

The difference between the tax which has been assessed against the taxpayer and that which the taxpayer claims is owed is attributable to the fact that the fraction used in the deficiency notices contained the interstate miles as well as the intrastate miles in the numerator of the fraction, whereas the taxpayer in its computations excluded from the numerator the interstate miles traveled within the State of Oregon. As a result of this different interpretation of the law notices of deficiency and assessment of September 9, 1955, compute deficiencies for the years 1950, 1951 and 1952 in the respective amounts of $517.31, $738.88 and $718.56 In addition to the amounts thus set out interest is to be added in the event that the deficiency is correct. The taxpayer, on the other hand, arrives at the conclusion that not only should the deficiencies thus computed be abated but that the taxpayer's tax has been overpaid for each of the three years in the respective amounts of $4,906.62, $3,700.31 and $2,967.36.

VII

The taxpayer contends that the use of both interstate and intrastate miles in the Oregon numerator of the allocation fraction, which fraction is used to apportion net income to this state, violates Art. I sec. 8 and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. The taxpayer did not raise the issue relating to the equal protection of the laws until June 25, 1956, at which time a letter was addressed to counsel for the Tax Commission calling attention to the fact that this amendment to the amended petition on appeal was to

be added. The Commission recognized the fact that this issue was not presented on the original appeal to the Commission, but this procedural defect is expressly waived and the additional issue will be considered as though it had appeared on the original appeal to the Commission.

VIII

Taxpayer's original refund claims were filed for the years 1950, 1951 and 1952 on February 22, 1955. At this time the statutory time limitation for the year 1950 had expired. Therefore, the refund claim for the year 1950 is not timely and this refund claim will not be considered on the merits.

IX

The statutory law applicable is ORS 317.070 and ORS 317.180, the regulations interpreting these sections are also applicable.

CONCLUSIONS OF LAW

I

The taxpayer is doing both an intrastate and interstate business in the State of Oregon.

II

The motor carrier business conducted by this taxpayer is a unitary business and a portion of its income attributable to the Oregon operations are best determined by the use of an apportionment formula.

III

In accordance with Commission interpretation and regulation the correct formula to use for a motor carrier in a case such as this is a fraction computed by the use of revenue miles.

IV

Where a taxpayer is doing both an intrastate business and an interstate business the tax attributable to its operations in this state is best measured by including in the denominator of the apportionment factor both the intrastate miles and the interstate miles traveled in this state. The denominator of the fraction will include both intrastate and interstate miles traveled everywhere, including this state. The case of *Spector Motor Service v. O'Connor*, (1951), 340 U.S. 602, 95 L. ed. 573, 71 S. Ct. 508, is not applicable in view of the fact that the taxpayer in that case was doing only an interstate business.

V

The inclusion of the interstate miles and the intrastates miles in the numerator of the apportionment factor does not cause the excise tax to violate Art. I sec. 8 (the so-called "commerce clause"), the "due process clause" or "equal protection clause" of the Fourteenth Amendment to the Constitution of the United States.

IT IS THEREFORE ORDERED that the deficiencies for the years 1950, 1951 and 1952 in the respective amounts of $517.31, $738.88 and $718.56, all plus interest, are due and owing.

It is further ordered that the refunds claimed by the taxpayer for the years 1951 and 1952 be denied.

STATE TAX COMMISSION
SAMUEL B. STEWART
Commissioner and Chairman
CARL CHAMBERS
Commissioner
RAY SMITH
Commissioner and Secretary

2. Trial Court Judgment and Decree, dated September 16, 1959.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

OREGON - NEVADA - CALIFOR-FAST FREIGHT, INC., a corporation	)	NO. 238 831
Plaintiff,	)	FINDINGS
vs.	)	OF FACT,
SAMUEL B. STEWART, CARL CHAMBERS and RAY SMITH, constituting the State Tax Commission of the State of Oregon,	)	CONCLUSIONS OF LAW, JUDGMENT AND DECREE
Defendants.	)	

This cause has been brought before this Court, pursuant to the provisions of ORS 317.470 to review a determination of the State Tax Commission of the State of Oregon, being Opinion and Order No. I-57-5, dated February 14, 1957, denying certain refund claims and imposing deficiency assessments upon plaintiff for corporate excise taxes for the years 1950, 1951 and 1952. This cause came on regularly for hearing before the Honorable Alfred T. Sulmonetti, Judge of the above-entitled court, on Tuesday, August 11, 1959. The suit was submitted to the Court upon a Statement of Stipulated Facts and stipulated exhibits. Plaintiff was represented by Ferris F. Boothe of the firm of Black, Kendall & Tremaine, its attorneys, and defendants were represented by Alfred B. Thomas, Assistant Attorney General of the State of Oregon, assigned to the Oregon State Tax Commission. Both parties submitted briefs and answer briefs in support of their respective contentions.

The Court hereby adopts that portion of the Statement of Stipulated Facts filed herein from the beginning thereof through the paragraph just preceding the heading "Defendants' Tax Computation," which portion begins on line 11, Page 1, and ends on line 8, Page 4 thereof, as its Findings of Fact in this case and by this reference incorporates said facts as fully as if set forth in full herein. The Court further finds that the fact that the defendants' allocation formula does not reach income earned outside of Oregon is irrelevant. Based upon said Findings of Fact and the exhibits admitted herein, the Court, being fully advised in the premises, hereby makes and enters the following:

CONCLUSIONS OF LAW

I.

The tax in issue is an excise tax as defined by ORS 317.010 (8) as follows:

> " 'Excise tax' means a tax measured by or according to net income imposed upon * * * all * * * business corporations for the privilege of carrying on or doing business in this state."

The above excise tax for the privilege of carrying on or doing business within the state may not be imposed upon a foreign corporation doing an exclusively interstate business within the State of Oregon. The privilege of doing business in interstate commerce within a state is one which the state may neither grant nor deny.

II.

Where a foreign corporation taxpayer is engaged in both intrastate and interstate commerce within the

State of Oregon, the State of Oregon, under Chapter 317, ORS, may tax the privilege of the foreign corporation of carrying on its intrastate business within the State of Oregon. In computing the amount of the excise tax to be levied upon such a foreign corporation, the State of Oregon is not necessarily precluded from utilizing a measure including some interstate business factors but the measure utilized must not be a patent or arbitrary taxing of the interstate business of the foreign corporation taxpayer.

III.

The use of revenue (line-haul) miles as set forth in the Statement of Stipulated Facts herein is a fair, reasonable and accurate measure to determine the proportion of the plaintiff's business carried on or done within the State of Oregon and to distinguish between plaintff's intrastate business and plaintiff's interstate business carried on or done within the State of Oregon.

IV.

The taxing formula of defendants, which utilizes all revenue miles within the State of Oregon as the numerator and all revenue miles of plaintiff everywhere as the denominator of a fraction to determine the portion of plaintiff's net income subject to the foregoing excise tax, is an arbitrary and unreasonable measure of plaintiff's privilege of doing intrastate business within the State of Oregon. It is, therefore, unconstitutional under Article I, Section 8, Clause 3, of the Constitution of the United States, the so-called "Commerce Clause", since it purports to include all of plain-

tiff's business, both interstate and intrastate, within the State of Oregon as a measure of the value of its privilege of doing intrastate business within the State of Oregon.

V.

The appropriate and proper formula for the allocation of that portion of plaintiff's total net income subject to the taxation by the State of Oregon under ORS Chapter 317 for the years here in issue is the fraction resulting from utilizing plaintiff's revenue miles in intrastate commerce within the State of Oregon as the numerator and plaintiff's revenue miles throughout its system as the denominator.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby adopts Plaintiff's Tax Computation as set forth in line 26, Page 5, through line 18, Page 6, of Statement of Stipulated Facts filed herein, and based upon the foregoing it is hereby

CONSIDERED, ORDERED, ADJUDGED AND DECREED that plaintiff's appeal from Opinion and Order No. I-57-5 dated February 14, 1957, of the State Tax Commission of the State of Oregon be and the same hereby is sustained, and it is further

CONSIDERED, ORDERED, ADJUDGED AND DECREED that plaintiff have and recover judgment from defendants, or whichever persons shall now and hereafter constitute the State Tax Commission of the State of Oregon, in the sum of $3,000, together with interest thereon at the rate of 6% per annum from April 15, 1952; the further sum of $700.31, together

with interest thereon at the rate of 6% per annum from May 19, 1952; and the further sum of $2,967.36, together with interest thereon at the rate of 6% per annum from April 16, 1953, together with plaintiff's costs and disbursements herein incurred, taxed in the sum of $34.40; and it is further

CONSIDERED, ORDERED, ADJUDGED AND DECREED that deficiency assessments levied upon plaintiff for the years 1950, 1951 and 1952, pursuant to Opinion and Order No. I-57-5, dated February 14, 1957, of the State Tax Commission of the State of Oregon, be and the same hereby are abated.

DATED this 18th day of September, 1959.

ALFRED T. SULMONETTI
Judge

Presented by:
BLACK, KENDALL & TREMAINE
Ferris F. Boothe
1200 Cascade Building
Portland 4, Oregon
Attorneys for Plaintiff

3. Opinion of Supreme Court of Oregon.

IN THE SUPREME COURT OF THE STATE OF OREGON

Oregon-Nevada-California Fast Freight, Inc., a corporation,

Respondent,

v.

Samuel B. Stewart, Carl Chambers, and Ray Smith, constituting the State Tax Commission of the State of Oregon,

Appellants.

Before the Entire Bench.

Sloan, J.

Defendants, acting as the State Tax Commission, assessed deficiency excise taxes against plaintiff for the years 1950, 1951 and 1952, and denied plaintiff's claim for refund of excise taxes for the same years. Plaintiff has abandoned the refund claim for the year 1950 because of the statute of limitations. Plaintiff appealed to the circuit court for Multnomah county. That court set aside the order of the commission and awarded plaintiff the claimed refunds. The commission appeals. The case was presented to the trial court upon an agreed statement of facts. No other evidence was submitted. It is necessary to decide if the commission's allocation of plaintiff's income attributable to Oregon discriminated against interstate commerce.

The facts that are essential to defining the issue to be discussed are taken, therefore, from the stipulation of facts:

> "Plaintiff's main offices and principal place of business were and are in San Francisco, California,

with a District Headquarters for Oregon in Portland, Oregon. During the period in question, plaintiff owned no real property in Oregon except some land in Ashland, Oregon, with a value of less than $500. It leased and operated its main Oregon terminal in Portland, and smaller terminals in Medford, Grants Pass, Klamath Falls, Coos Bay, Roseburg and Coquille.

"Plaintiff's operations consisted of hauling freight between Portland, Oregon and San Francisco, California and way points. The bulk of its traffic in interstate commerce was between Portland, Oregon, and San Francisco, California, with some comparatively minor traffic between San Francisco, California and Klamath Falls and San Francisco and Medford. Its operations in intrastate commerce in Oregon consisted of freight hauling between Portland, Oregon, and points in western Oregon, including Coos Bay, Coquille, Grants Pass and Roseburg, with the bulk of the movement southbound from Portland, Oregon. Except for pick-up and delivery incident to its line-haul operation, plaintiff conducts no independent intracity cartage operations.

"The corporation excise tax is levied for the privilege of carrying on or doing business by the taxpayer within the State of Oregon. [The statutes imposing the tax and requiring the tax commission to provide the formula for taxing multi-state businesses are in the margin.] It does not purport to

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For the years involved here the tax was imposed by § 110-1506, OCLA:

"Every * * * corporation doing or authorized to do business within this state, except as hereinafter provided, shall annually pay to this state, for the privilege of carrying on or doing of business by it within this state, an excise tax according to or measured by its net income, as herein defined, * * *."

The authority of the tax commission to allocate income is § 110-1507, OCLA:

"(a) If the gross income of a corporation is derived from

be a tax to pay for the use of the highways nor to pay for the cost of regulations of the carrier, either by the Motor Vehicle Department or by the Public Utilities Commission.

"It is economically beneficial, but not necessary, for plaintiff to carry on its operations in both interstate and intrastate commerce. The local pick-up and delivery operations, the cost of administration, the cost of vehicle maintenance and the cost of other terminal operations are substantially the same character for both plaintiff's interstate and intrastate operation. The local pick-up and delivery operations, the use of mobile equipment and the use of its terminal facilities are comingled between intrastate and interstate commerce. Plaintiff designates no property specifically for use in intrastate or interstate commerce. Line-haul trips are scheduled separately with an entire load in almost all instances destined either for an intrastate or outside-the-state destination. Plaintiff secures and handles its shipment contracts for both intrastate and interstate commerce through the same office in Oregon.

"Plaintiff, in 1950, 1951 and 1952, paid a number of taxes in California, Nevada and Oregon, including heavy gasoline and diesel fuel taxes of various

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business done both within and without the state, the determination of net income shall be based upon the business done within the state, and the commission shall have power to permit or require either the segregated method of reporting or the apportionment method of reporting, under rules and regulations adopted by the commission, so as fairly and accurately to reflect the net income of the business done within the state.

"(b) The provisions of subsection (a) dealing with the apportionment of income earned from sources both within and without the state of Oregon are designed to allocate to the state of Oregon on a fair and equitable basis a proportion of such income earned from sources both within and without the state. Any taxpayer may submit an alternative basis of apportionment with respect to its own income and explain that basis in full in its return. If approved by the tax commission that method will be accepted as the basis of allocation."

types for the benefit of state highways in all three states, privilege taxes for the privilege of operating within said states, and various license fees for the operation of its vehicles with the three states. Said taxes require the keeping of accurate records as to revenue (line-haul) miles which are the usual bases for the imposition of license or taxing measures upon a motor vehicle common carrier. Mileage records are also required by the Interstate Commerce Commission of the United States and the Public Utilities Commissions of Oregon and California. These mileage records are constantly audited [sic] and their accuracy is accepted by the various taxing and regulatory authorities of the United States and of Oregon and California. As a regular route scheduled carrier, plaintiff's operations lend themselves to an accurate mileage accounting system.

"Revenue miles travelled by plaintiff for the years in issue and the allocation fractions based thereon are as follows:

	1951	1952
"Oregon intrastate miles	870,600	907,627
Oregon interstate miles.	696,217	697,622
Total Oregon miles	1,556,817	1,605,249
Oregon intrastate miles divided by total miles everywhere	.2083	.2162
Total Oregon miles divided by total miles everywhere	.3725	.3824"

A similar tabulation for the year 1950 has been eliminated. The Oregon intrastate miles were, for our purposes, fully segregated. They consisted exclusively of line-haul miles of carriage between Portland and other cities in Oregon and return. The interstate miles were also line-haul miles traveled within Oregon but the termination points of the hauls were beyond Oregon boundaries.

The "allocation fractions" set forth in the table

above provide the difference between the parties and the basis for this case. In computing the amount of plaintiff's excise tax the commission adopted a formula which was determined by dividing all line-haul miles within the state of Oregon into the total miles of plaintiff's operations in all states. Plaintiff contends that the determination of the fraction should be made by using only the line-haul miles in Oregon which are strictly intrastate in character; that the formula adopted by the commission by including the interstate line-haul miles within the state of Oregon violated Art I, § 8, of the United States Constitution. That section, of course, grants Congress the power to regulate commerce.

It is apparent that by the commission's allocation factor the plaintiff would be obliged to pay an excise tax to Oregon on .3725 per cent of its total 1951 income and on .3824 per cent of its total 1952 income. Plaintiff's computation would require it to pay the tax on .2083 per cent of the income for 1951 and .2162 for 1952. This creates the difference in the amount of taxes plaintiff may be required to pay for the two years in question.

The effort of the state governments to tax all of the business conducted within the respective states, in one form or another, has been the source of much litigation on the tender subject of impairing or discriminating against interstate commerce. The first problem presented, therefore, is to glean from numberless decisions of the Supreme Court of the United States on the subject of state taxes and interstate commerce the rule

to be applied to the facts presented. To avoid undue repetition every reference to the Supreme Court will refer to the Supreme Court of the United States.

Both parties have cited many decisions and then engaged in a matching game to compare the facts of this case with the decisions which seem to allow the view urged by each party. The difficulty which evolves from this matching process can be seen by a quote from one of the recent opinions of the Supreme Court in Northwestern Cement Co. v. Minn., 1958, 258 US 450, 457, 79 S Ct 357, 3 L Ed2d 421, 67 ALR2d 1292:

> " * * * Commerce between the States having grown up like Topsy, the Congress meanwhile not having undertaken to regulate taxation of it, and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. * * * "

We can narrow and simplify the issue we will decide by resort to two recent decisions of the Supreme Court. The first of these, Spector Motor Service v. O'Connor, 340 US 602, 71 S Ct 508, 95 L Ed 573, was decided in 1951. The case involved the constitutionality of a Connecticut statute as that state attempted to apply the statute to an interstate motor carrier. The Connecticut statute, like the Oregon statute, levied the tax for the "privilege" of doing business within the state of Con-

necticut. The business conducted by Spector Motor Service, Inc. within the state of Connecticut was *exclusively* interstate in character. It did not engage in any intrastate carriage of the kind performed by plaintiff in Oregon. The Supreme Court held that the state could not impose a privilege tax upon Spector because of the exclusive interstate nature of its business. This was on the theory that since there was no incidence of "local activity" in Connecticut, the state could neither grant nor deny the right to engage in interstate commerce within the state.

In the case before us the commission conceded that the Oregon "privilege" tax is like that of Connecticut and that if the plaintiff were engaged exclusively in interstate commerce the Spector case would preclude any payment of the tax by plaintiff. On the other hand, plaintiff conceded that since it did engage in intrastate carriage, wholly within Oregon, then the Spector case does not prohibit the state from collecting the tax imposed by § 110-1506, OCLA, on that portion of plaintiff's income allocable to Oregon. The conflict arose, as we have mentioned before, from the basis upon which the commission arrived at the amount of plaintiff's income subject to Oregon tax. We will come back to the issue after referring to the other of the two cases mentioned.

The second decision of the Supreme Court to be mentioned is that of Northwestern Cement Co. v. Minn., supra, already quoted from. That case held that Minnesota could levy an *income tax* on the cement company even though the business of that company within Minne-

sota was *exclusively interstate* in character. The theory of the Northwestern case was that an income tax, fairly apportioned, does not prevent or impede the right to engage in interstate commerce.

The Supreme Court, therefore, by a process of attaching labels to the kind of tax imposed, has said that a state "privilege" tax may not be levied upon an exclusively interstate business but that an "income tax" can be. The label basis of deciding the validity of a state tax as it may or may not affect interstate commerce has been the cause of criticism by writers and by Justice Clark in his dissenting opinion in the Spector case. See, Hartman, State Taxation of Interstate Commerce, 1953, p 201 et seq. In the case here we think there is little to distinguish the tax, imposed by § 110-1506, OCLA, and the Oregon income tax later imposed by the Corporation Income Tax of 1955, Oregon Laws 1955, ch 334. As already mentioned, however, the plaintiff concedes that if the tax here in question were labeled "income tax" it would be compelled to pay the tax and the commission concedes that since the tax in question is labeled a "privilege" tax, the plaintiff could not be taxed at all if its entire business were interstate. Neither party has attempted to ascertain if there is any actual difference, except the label, in the nature of the taxes imposed nor, by formulation of an issue, required this court to do so. We will take the parties as we find them.

We are not, therefore, required to decide if the statute which imposed the tax was itself, an invalid

excursion into interstate commerce. What has been said should make it clear that there remains the one limited issue: Did the allocation formula adopted by the commission, which included line-haul miles operated by plaintiff's trucks within the boundaries of Oregon, but which were strictly interstate in character, utilize a constitutional means to measure plaintiff's Oregon tax obligation?

It is virtually impossible to reach a satisfactory answer to this question by an attempt to match the limited facts presented in this case with any one of several hundred cases that have considered more or less similar problems. The uncertain result which attends this process is exemplified by an extensive analysis of many such cases, and the conflicting result arrived at in the process, by the majority and dissenting opinions of the Supreme Court of Michigan in Duluth, S. S. & A. R. Co. v. C. & S. Comm., 1958, 353 Mich 636, 92 NW2d 22; cert den 359 US 310. The Michigan court was confronted with a case almost identical to that presented here. The taxpayer was a railroad which, like plaintiff here, was engaged in commerce which could be segregated into the part that was wholly intrastate and that which was interstate. The officials responsible for assessing the Michigan tax applied a formula identical to that of the commission here and included the interstate ton-miles operated by the taxpaying railroad in Michigan. The majority of the Michigan court concluded that decisions of the Supreme Court sustained the right of the state to include the interstate ton-miles operated within that state in arriving at a formula

for allocating income. We agree with the result reached by the Michigan court.

The futility of attempting to find a settled rationale within the opinions of the Supreme Court is also indicated by the excellent historical analysis of the decisions by Professor Hartman in his work on State Taxation of Interstate Commerce, previously cited. See also: State Taxation of Interstate Commerce: An Appraisal and Suggested Approach, Wash ULQ, 1953, also written by Professor Hartman. The author demonstrates that at different periods in its history the Supreme Court has fluctuated in the theories by which it has approached the subject at hand. Not only that, he also shows the irreconcilable conflict between the cases involving the right to tax in comparison with the cases which have allowed the states to regulate interstate commerce in areas other than taxation. A study of the works cited is convincing that we will not find a solution to the question to be decided by the matching process.

Instead, it is our view that a more realistic and practical approach is to find and adopt a suitable test to measure the application of the formula against the claim that it was an interference with interstate commerce. The need for the kind of a solution we seek is emphasized by the opinion of the Supreme Court in Spector Motor Service v. O'Connor, supra, 340 US, pp 609-610:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax

> the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge *by applying the tax-rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate.* *Interstate Pipe Line Co. v. Stone, supra; International Harvester Co. v. Evatt*, 329 U.S. 416; *Atlantic Lumber Co. v. Comm'r of Corporations and Taxation*, 298 U. S. 553. * * * " (Emphasis supplied)

We note that the dissenting opinion of Justice Clark in the Spector case states: "Hence, if appellant had been engaged in an iota of activity which the Court would have been willing to call 'intrastate,' Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the State, even though derived from interstate commerce." 350 US, pp 610-611. There is nothing in the majority opinion in Spector, or in any later decision of the Court, which says the statement by Justice Clark is not correct.

In other words, what test do we apply, then, to determine if the formula to allocate income adopted by the state is within the "reasonable limits" permitted to the state to enable it to find a "fair proportion of the taxpayer's business done within the state, including both interstate and intrastate [commerce]"? Our examination of the cases and other writings leads us to select a test to measure discrimination adopted by Justice Rutledge in a concurring opinion in Memphis Gas Co. v. Stone, 1947, 335 US 80, 96, 97, 68 S Ct

1425, 92 L Ed 1832. The test is: "[The tax] places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; is duly apportioned, that is, does not undertake to tax any interstate activities carried on outside the state's borders; and cannot be repeated by any other state."

We hold that the allocation formula enforced by the commission did not violate plaintiff's constitutional rights unless the application of the formula violated the requirement of nondiscrimination. When we apply the test so clearly stated by Justice Rutledge we find that there were no facts submitted which suggest that the commission formula: (1) subjected plaintiff to a greater tax burden than a competitor engaged only in Oregon carriage; (2) taxed income earned from outside the state; nor (3) did the formula subject plaintiff's Oregon mileage to taxation by California or any other state in which plaintiff operated. In the absence of the facts which would have established or demonstrated violation of these requirements, we find that the tax did not discriminate against or impede plaintiff's ability to engage in interstate commerce.

It was not enough for plaintiff merely to show that its interstate miles within the boundaries of Oregon are included in the commission's computations. The plaintiff must also prove some interference or discrimination because of that fact. The plaintiff has failed to do so. The party asserting constitutional violation must sustain the burden of proof. Jehovah's Witnesses v.

Mullen et al, 1958, 214 Or 281, 330 P2d 5; app dis 359 US 436.

A study of the cases reveals another consideration the Supreme Court has applied to cases involving this problem which we wish to mention. For example, it was said in the majority opinion in Memphis Gas Co. v. Stone, supra, 335 US, pp 95-96:

> "* * * The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In this case, we are not concerned with deciding if plaintiff is engaged in a "local activity" in Oregon. That, of course, must be admitted. If there is validity to the concept that a state is entitled to tax interstate commerce, in fair proportion, on the theory that it is the state, not the national government, that provides the orderly climate in which the commerce thrives, then it would appear that there can be no distinction between the benefit that Oregon afforded plaintiff with respect to a truckload of goods consigned from Portland to Klamath Falls than the benefit afforded when one of plaintiff's trucks traversed the same route but went

through Klamath Falls destined for San Francisco. Even the opinions of the Supreme Court which are most restrictive upon the power of the state to tax any form of interstate commerce recognize some power in the state to tax for benefits bestowed so long as the tax does not hamper the flow of commerce. See Freeman v. Hewit, 1946, 329 US 249, 255, 67 S Ct 274, 91 L Ed 265.

We are satisfied that the rule we have applied is sound in law and practice. It is in harmony with many of the decisions of the Supreme Court of the United States, some of which we have cited. In addition, see Interstate Pipe Line Co. v. Stone, 1948, 337 US 662, 69 S Ct 1264, 93 L Ed 1613; Harvester Co. v. Evatt, 1946, 329 US 416, 67 S Ct 444, 91 L Ed 390, and Maine v. Grand Trunk R'y Co., 1891, 142 US 217, 12 S Ct 121, 35 L Ed 994. The reference to these, as well as other cases referred to in this opinion, should not be taken to mean that we have not examined all of the cases cited by plaintiff. We have done that and examined other authority as well. No one would be wiser if we would extend this opinion to the extent necessary to mention each case. The judgment is reversed.

4. Judgment of Supreme Court of Oregon.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the court room in the city of Salem on the first Monday, the 7th day of March, 1960, WHEREUPON on this Wednesday, the 15th day of June, 1960, the same being the 38th judicial day of said term, there were present: Wm M. McAllister, Chief Justice, George Rossman, Harold J. Warner, William C. Perry, Gordon W. Sloan, Kenneth J. O'Connell, Alfred T. Goodwin, Associate Justices, F. M. Sercombe, Clerk, when the following proceedings were had:

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., a corporation, Respondent	
v.	
SAMUEL B. STEWART, CARL CHAMBERS, and RAY SMITH, constituting the State Tax Commision of the State of Oregon, Appellants	Appeal from MULTNOMAH County

This cause on May 11, 1960, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration, and the Court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED, ADJUDGED and DECREED that the judgment of the court below rendered and entered in this cause be and the same is in all things reversed and set aside.

IT IS FURTHER ORDERED that appellants have and recover of and from respondent their costs and disbursements in this Court taxed at $249.68.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance with the opinion of the Court herein and in accordance therewith.

5. Order of Supreme Court of Oregon Denying Petition for Rehearing.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the court room in the city of Salem on the first Monday, the 7th day of MARCH, 1960, WHEREUPON on this FRIDAY, the 5th day of AUGUST, 1960, the same being the 56th judicial day of said term, there were present: Wm. M. McAllister, Chief Justice, George Rossman, Harold J. Warner, William C. Perry, Gordon W. Sloan, Kenneth J. O'Connell, Alfred T. Goodwin, Associate Justices, F. M. Sercombe, Clerk, when the following proceedings were had:

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., a corporation, Respondent	
v.	
SAMUEL B. STEWART, CARL CHAMBERS, and RAY SMITH, constituting the State Tax Commission of the State of Oregon, Appellant	Appeal from MULTNOMAH County

The Court having duly considered respondent's petition for rehearing, and the Court being fully advised thereon, IT HEREBY IS ORDERED that such petition be and the same hereby is denied.

6. Notice of Appeal and Proof of Service.

IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., a corporation, Plaintiff-Respondent, v. SAMUEL B. STEWART, CARL CHAMBERS, and RAY SMITH, constituting the State Tax Commission of Oregon, Defendants-Appellants.

NOTICE OF APPEAL

I.

Notice is hereby given that Oregon-Nevada-California Fast Freight, Inc., a corporation, the Plaintiff-Respondent above named, hereby appeals to the Supreme Court of the United States from the final judgment of this Honorable Court, the Supreme Court of the State of Oregon, which judgment was entered on August 5, 1960, whereby this Court refused to reconsider and rehear the above-entitled cause in which it had entered its Opinion and Judgment against this Plaintiff-Respondent on June 15, 1960. In said opinion and judgment, the Supreme Court of the State of Oregon reversed judgment and decree in favor of plaintiff-respondent previously entered by the Circuit Court of the State of Oregon for the County of Multnomah in this cause bearing Clerk's Registry No. 238,831, which cause is an appeal from an opinion and order of the State Tax Commission of the State of Oregon denying certain refund claims and entering certain deficiencies relative to the annual excise tax imposed upon plaintiff-respondent for the years 1950, 1951 and 1952.

This appeal is taken pursuant to 28 U.S.C. §1257 (2), 28 U.S.C. §2101(c), and 28 U.S.C. §2103.

II.

The Clerk of the Supreme Court of the State of Oregon will please prepare a transcript of the record in this cause for transmission to the Supreme Court of the United States, and include in said transcript the following:

1) Complaint on appeal from order of the State Tax Commission;
2) Amended Answer of defendants;
3) Reply of plaintiff;
4) Statement of Stipulated Facts, together with exhibits 1, 2 and 3;
5) Findings of Fact, Conclusions of Law, Judgment and Decree of the Circuit Court of the State of Oregon for the County of Multnomah, dated September 17, 1959;
6) Notice of Appeal of defendants to the Supreme Court of Oregon, dated November 2, 1959;
7) Opinion of the Supreme Court of the State of Oregon, filed June 15, 1960;
8) Judgment, dated June 15, 1960, of the Supreme Court of the State of Oregon;
9) Petition for Rehearing filed by Plaintiff-Respondent;
10) Order, dated August 5, 1960, of the Supreme Court of Oregon denying Petition for Rehearing.

III.

1) Did the Supreme Court of the State of Oregon err in holding that the excise tax for the privilege of doing business with the state under Section 110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949, had not been applied to plaintiff-respondent in an unconstitutional manner in violation of the "com-

merce clause," Article I, Section 8, Clause 3, of the Constitution of the United States, by its imposition by defendants-appellants upon all business, both interstate and intrastate, done by plaintiff-respondent, a foreign corporation, within the State of Oregon?

2) Did the Supreme Court of the State of Oregon err in failing to find that the measure of the excise tax authorized by Section 110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949 (ORS 317.070), imposed upon plaintiff-respondent, a foreign corporation, and including all of plaintiff-respondent's business, both interstate and intrastate, as a measure of the taxable privilege of conducting intrastate business within the State of Oregon was an arbitrary and unreasonable measurement and, therefore, violated the "due process" clause of Section 1 of the 14th Amendment to the Constitution of the United States?

3) Did the Supreme Court of the State of Oregon err in failing to find that the measure of the excise tax authorized by Section 110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949 (ORS 317.070), imposed by defendants-appellants upon plaintiff-respondent, a foreign corporation, and including all of plaintiff-respondent's business, both interstate and intrastate, within the State of Oregon, while not being applied to any of the business of plaintiff-respondent's competitors, being foreign corporations, doing solely interstate business within the State of Oregon, was an arbitrary and unreasonable classification, and, therefore, violated the "equal protection" clause of Section 1 of the

14th Amendment to the Constitution of the United States.

FERRIS F. BOOTHE
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Fast Freight, Inc.
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BLACK, KENDALL & TREMAINE
Of Counsel
Filed: September 15, 1960

PROOF OF SERVICE

County of Multnomah)
) ss.
STATE OF OREGON)

I, FERRIS F. BOOTHE, attorney for Oregon-Nevada-California Fast Freight, Inc., a corporation, plaintiff-respondent, herein, depose and say that on the 14th day of September, 1960, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on defendants-appellants Samuel S. Stewart, Carl Chambers and Ray Smith, and their successors comprising the State Tax Commission of the State of Oregon, by mailing a copy thereof, in a duly addressed envelope, with first class postage prepaid, to Alfred B. Thomas, attorney for defendants-appellants, at State Office Building, Salem, Oregon, his post office address.

FERRIS F. BOOTHE

SUBSCRIBED AND SWORN to before me this 14th day of September, 1960.

ELIZABETH A. MOORE
Notary Public for Oregon
My Commission Expires: 6 11 63

FILE COPY

Office Supreme Court, U.S.
FILED
NOV 30 19[illegible]
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 521

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., a corporation,

Petitioner-Appellant,

vs.

SAMUEL B. STEWART, CARL CHAMBERS and RAY SMITH, constituting the State Tax Commission of the State of Oregon,

Defendants-Appellees.

MOTION TO DISMISS

On Appeal from the Supreme Court of the State of Oregon.

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MOTION TO DISMISS

Defendants-Appellees, herein called defendants, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal from the decree of the Supreme Court of the State of Oregon be dismissed on the ground that it does not present a substantial federal question.

STATEMENT OF THE CASE

Plaintiff-Appellant, herein called plaintiff, has set forth the applicable statutes. The statement of stipulated facts in the record on file discloses plaintiff's operation as follows:

> "Plaintiff's operations consisted of hauling freight between Portland, Oregon and San Francisco, California and way points. The bulk of its traffic in interstate commerce was between Portland, Oregon, and San Francisco, California and Klamath Falls and San Francisco and Medford. Its operations in intrastate commerce in Oregon consisted of freight hauling between Portland, Oregon, and points in western Oregon, including Coos Bay, Coquille, Grants Pass and Roseburg, with the bulk of the movement southbound from Portland, Oregon. Except for pick-up and delivery incident to its line-haul operation, plaintiff conducts no independent intracity cartage operations.
>
> "It is economically beneficial, but not necessary, for plaintiff to carry on its operations in both interstate and intrastate commerce. The local pick-up and delivery operations, the cost of administration, the cost of vehicle maintenance and the cost of other terminal operations are substantially the same charac-

ter for both plaintiff's interstate and intrastate operations. The local pick-up and delivery operations, the use of mobile equipment and the use of its terminal facilities are commingled between intrastate and interstate commerce. Plaintiff designates no property specifically for use in intrastate or interstate commerce. Line-haul trips are scheduled separately with an entire load in almost all instances destined either for an intrastate or outside-the-state destination. Plaintiff secures and handles its shipment contracts for both intrastate and interstate commerce through the same offices in Oregon."

Oregon measures its tax by determining Oregon's fraction of plaintiff's property, payroll and sales which is substantially equal to Oregon's fraction of plaintiff's line-haul miles. This results because mobile property (trucks, etc.), mobile wages (truckers' wages, etc.) and sales will be determined by the fraction or percentage resulting from dividing miles traveled in Oregon by total company miles in the three states. (Note: Plaintiff's brief, page A16, line 5, the word "into" should be deleted and the word "by" inserted—see Oregon Supreme Court Opinion, 70 Adv. Sh. 1651, line 14.) The stipulation states:

"In determining the deficiency due for each of the years the Commission instructed its auditors to compute the tax by the normal three-factor formula or the revenue (line-haul) mileage formula, whichever produced the lesser tax. The revenue formula was used because it produced the lesser tax. This procedure was adopted by the Commission because the allocation formula to be applied to transportation companies was not at the time specifically set out in regulation form."

Plaintiff operates in three states—Oregon, California and Nevada. Oregon's measure includes only income arising from business done in Oregon. The stipulation states:

> ". . . the income attributable to Oregon under the asserted Commission revenue formula added to the income attributed to California by its formula (substantially equal to the Oregon formula) and including the income attributed to Nevada does not exceed 100 percent of plaintiff's total income subject to tax for any of the years in question."

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The "Equal Protection" Clause Is Not Violated

The third question raised by plaintiff, pages 7 and 19 of its brief, concerning violation of the "equal protection" clause was not pressed by plaintiff on appeal and not discussed in the Oregon Supreme Court Opinion. Plaintiff, on page 19 of its brief, is contending that a solely interstate business is not subject to Oregon's privilege tax, *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951), and therefore it cannot be subject to the tax as measured. The issue is directly raised in *Matson Nav. Co. v. State Board*, 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936), and decided against plaintiff's contention. This Court, at page 446, held that since a solely interstate operation cannot be subjected to a privilege tax because of the "commerce clause" limitation, a state legislature is without power to include solely interstate businesses within

the tax and such lack of power by the state legislature cannot be grounds for asserting violation of the equal protection clause.

B. "Due Process" Is Not Violated

The second question raised by plaintiff, pages 6 and 19 of its brief, is resolved by the statement of stipulated facts. Plaintiff concedes and has stipulated that Oregon's measure only reaches income earned in Oregon. The nature of Oregon's formula is such that it neither purports to nor does tax or measure any activity beyond Oregon's jurisdiction. The measure is based on miles traveled in Oregon. Plaintiff's district headquarters are in Oregon. Plaintiff travels regularly and systematically on scheduled routes between many Oregon cities. This Court has consistently held that a state's jurisdiction to tax in these circumstances is clear and that a measure such as Oregon's does not violate due process.

In *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S. Ct. 1425, 92 L. Ed. 1832 (1947), at page 86:

> "There is no question here of due process. The gas company's property is in the taxing state where the taxable incidents occurred."

Also, *Butler Bros. v. McColgan*, 315 U.S. 501, 507, 62 S. Ct. 701, 86 L. Ed. 991 (1942), discloses that due process is concerned with whether or not there are "extraterritorial values being taxed."

The conclusion by plaintiff, second paragraph—page 19 of its brief, is stated without authority and is contrary

to judicial precedent. Oregon has jurisdiction to tax and its measure only reaches income earned in Oregon. Due process asks no more.

C. The "Commerce Clause" Is Not Violated

The first question raised by plaintiff, page 6 of its brief, appears to rest on an analysis of the decision in *Spector Motor Service, Inc., supra.* Plaintiff finds a conflict in the following portions of the opinions of the case.

The majority opinion, 340 U.S. at 609-610:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate."

The minority opinion, 340 U.S. at 610-611:

> "Hence, if appellant had been engaged in one iota of activity which the court would have been willing to call 'intrastate', Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the state, even though derived from interstate commerce."

The issue presented is whether the "reasonable limits" phrase of the majority statement ought to be construed to limit the computation to exclude any interstate income if possible or should it be construed to limit the compu-

tation to business done within the state "including both interstate and intrastate."

Defendants see no conflict in the two statements. The analysis advocated and adopted by the Oregon Supreme Court, 70 Adv. Sh. 1657, to tax interstate business where state jurisdiction is present by a measure that includes all intrastate and interstate business in the state is consistent with the many cases dealing with the problem. The *Spector* case is not novel in this respect for many early decisions are similar in the analysis of a proper measure.

Thus, in *Western Livestock v. Bureau*, 303 U.S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (1937), New Mexico levied a privilege tax on business done within the state measured by gross receipts. The taxpayer solicited interstate advertising in conjunction with its local printing business and contended that the tax could not be levied against such portion because of the commerce clause. The court sustained the gross receipts measure of the tax and declared at page 255:

> "* * * If the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment. [cit.]"

The legal principle applied to determine whether the measure is constitutional in regard to the commerce clause is whether or not the measure tends to place interstate commerce at a competitive disadvantage. *McGold-*

rick v. Berwind-White Co., 309 U.S. 33, 45, 60 S. Ct. 388, 84 L. Ed. 565 (1940), which is equal to the test of whether or not interstate commerce is being discriminated against. The same principle is restated in a different way in *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 88, 68 S. Ct. 1425, 92 L. Ed. 1832 (1947):

> "A glance at the activities named above [local activities in maintaining, keeping in repair, and otherwise in manning 135 miles of pipeline in Mississippi] shows that there is no possibility of multiple taxation through the same exaction by the states. The amount of the tax is reasonable. It is properly apportioned to the investment in Mississippi." (Bracketed material ours.)

The Mississippi tax was imposed on the activities named and measured by $1.50 for each $1,000 of value of property employed in Mississippi. The measure of the tax included interstate business, since the parties stipulated that no intrastate business was done. This Court sustained the measure however when it sustained the tax as being properly imposed on a "local incident". The concurring opinion, at page 96, explains that though interstate business was included in the measure, the tax was not an unreasonable burden on interstate commerce. The unreasonable burden philosophy is another way of stating that interstate commerce cannot be placed at a competitive disadvantage or discriminated against or subjected to multiple taxation. Oregon's taxing formula violates none of the tests.

In *Matson Nav. Co. v. State Board*, 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936), California sustained a

privilege tax measured by net income from all sources of business done within the state, whether foreign, domestic or interstate. The taxpayer was a domestic corporation but the measure was not sustained for that reason. This Court declared at page 444:

> ". . . A net income justly attributable to all classes of business done within the state may be used as a measure of a tax imposed to pay the state for the use therein of the corporate franchises granted it."

The corporate franchises referred to include the franchise to do business rather than merely the charter granted, for the court cited as its authority *Bass, Ratcliff and Gretton, Limited v. State*, 266 U.S. 271, 45 S. Ct. 82, 69 L. Ed. 282 (1924), and *Underwood Typewriter Company v. Chamberlin*, 254 [redacted], 41 S. Ct. 45, 65 L. Ed. 165 (1920), both of which involved foreign corporations.

Following the *Matson* case, *Ford Motor Co. v. Beauchamp*, 308 U.S 331, 60 S. Ct. 273, 84 L. Ed. 304 (1939), applied the same principle to a foreign corporation, holding that a state's power to tax foreign corporations is as unrestricted as that for domestic corporations so far as the commerce clause is concerned. It sustained a doing business privilege tax measured by gross receipts to determine capital employed in the taxing state (Texas). The taxpayer had contended that the measure was unreasonable since it reached assets employed in interstate commerce. This Court held the imposition was properly laid on an intrastate privilege and the measure thereof was reasonable since it was limited to property within the taxing jurisdiction.

The foregoing principles and other objections to Oregon's type of measure had been resolved in favor of state taxation very early in the *Underwood Typewriter* case, *supra*, where Mr. Justice Brandeis declared at page 119:

> "It is contended that the tax burdens interstate commerce and hence is void under § 8 of Article I of the Federal Constitution. Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U.S. 350, 364; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U.S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled. *U.S. Glue Co. Oak Creek*, [sic] 247 U.S. 321; *Shaffer v. Carter*, 252 U.S. 37, 57. Compare *Peck & Co. v. Lowe*, 247 U.S. 165. Whether it be deemed a property tax or franchise tax, it is not obnoxious to the commerce clause."

The same conclusion was reached in the *International Shoe Co. v. Shartel*, 279 U.S. 429, 49 S. Ct. 380, 73 L. Ed. 781 (1928), at page 433:

> "A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business,

if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce * * *"

Plaintiff cites four cases in support of the conflict it finds in the two statements from the *Spector* decision.

Sprout v. City of South Bend, 277 U.S. 163, 171, 48 S. Ct. 502, 504, 72 L. Ed. 833, 837 (1928)

East Ohio Gas Company v. Tax Commission of Ohio, 283 U.S. 465, 470, 51 S. Ct. 499, 500, 75 L. Ed. 1171, 1174 (1931)

Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384, 393, 55 S. Ct. 477, 482, 79 L. Ed. 934, 942 (1935)

Castle v. Hayes Freight Lines, Inc., 348 U.S. 61, 75 S. Ct. 191, 99 L. Ed. 68 (1954)

The four cited cases evidence the fact that plaintiff is confusing the constitutional issue concerning the imposition of a tax with a separate constitutional issue concerning the measure of a tax which has been properly imposed. The issue on a proper measure requires proof by plaintiff that the measure affects it unreasonably.

The tax in the *Sprout* case was a license fee and was stricken because its very nature made it a burden on interstate commerce. The tax was not limited to activity within the taxing jurisdiction and the amount was increased because of the interstate movement beyond the

state. The tax in the *Cooney* case was laid on interstate commerce as stated by this Court in *Cloverdale v. Pipe Line Co.*, 303 U.S. 604, 58 S. Ct. 736, 82 L. Ed. 1043 (1937), at page 611:

> "In the . . . *Cooney* case, taxes levied on the business of engaging in interstate commerce were held invalid."

and at page 609:

> "While a privilege tax by a state for engaging in interstate business has frequently met the condemnation of this Court as a regulation of commerce [citing *Cooney* and *Sprout* cases] privilege taxes for 'carrying on a local business' even though measured by interstate business, have been sustained."

The defect found to exist in both cases was that the fee imposed could not be properly apportioned since the fee was exacted in the same manner for the buses in the *Sprout* case and telephones in the *Cooney* case, whether operated wholly within the state or between states. Interstate commerce could be similarly taxed in every other jurisdiction to its disadvantage. This conclusion is clear from the early opinion of Mr. Justice Brandeis (who wrote the *Sprout* opinion) in *Underwood Typewriter Company* case, supra, at page 119, where this Court declares:

> "That a tax measure by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled."

It is insufficient for plaintiff merely to show that interstate business is included in the measure; plaintiff

must prove the measure imposes an undue burden upon interstate commerce or discriminates against it. This is also seen from the discussion by Mr. Justice Brandeis in a subsequent opinion in *Pacific Tel. Co. v. Tax Commission*, 297 U.S. 403, 56 S. Ct. 522, 80 L. Ed. 760 (1935), at page 413:

> "A tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce."

The result must be judged by reason of its consequences and by its practical operation. Oregon has laid its tax on a constitutionally allowable privilege (plaintiff doing business in the state) and its measure is reasonable. Where the nature of the imposition is a burden on interstate commerce as in the *Sprout* and *Cooney* cases, the tax should be stricken but where the imposition is not a burden, the taxpayer should demonstrate the measure is a burden. Plaintiff has made no attempt to show that the measure of Oregon's properly imposed privilege tax burdens interstate commerce.

The *East Ohio Gas Company* case rests on the decision in the *Sprout* case and appears to be within the above analysis. The *Castle v. Hayes* case is not relevant to the issue before this Court. The state in that case was attempting to bar a carrier from operation within the state. The principle is within the doctrine affirmed in the *Spector Motor Service* case.

Plaintiff further contends, at page 17 of its brief:

> "Another important aspect of this substantial federal question involving interstate commerce should

also be considered. In reversing the trial court, the Supreme Court of the State of Oregon characterized the difference between a tax on the privilege of doing business as set forth in § 110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949 (ORS 317.070) and measured by net income and a tax levied directly on net income as merely a matter of labels attached to the cases by the United States Supreme Court (see A19, infra). The decision of the Supreme Court of Oregon rested in part upon the erroneous premise that there is no essential difference in the formula application between a tax on net income and a tax on the privilege of doing business measured by net income. This determination entirely failed to consider the different operating incidences of the two forms of taxation and the legal consequences flowing therefrom as established by this Court in the following leading cases."

The Oregon court expressly found no issue on the matter of the difference between an income tax and a privilege tax measured by net income (Oregon's net income tax was not in effect during the years at issue). The Oregon court, at page 1651 (Pl. Br., p. A19), states:

". . . plaintiff concedes that if the tax here in question were labeled 'income tax' it would be compelled to pay the tax and the commission concedes that since the tax in question is labeled a 'privilege' tax, the plaintiff could not be taxed at all if its entire business were interstate. Neither party has attempted to ascertain if there is any actual difference, except the label, in the nature of the taxes imposed nor, by formulation of an issue, required this court to do so. We will take the parties as we find them."

The Oregon decision was based on the fact the plaintiff was doing business in Oregon and the measure reason-

ably reached only income earned in Oregon. Plaintiff's brief in this regard has strayed from the issues to discuss dicta. If the Oregon court's discussion raises a question it should not be an appealable one. A substantial federal question should not arise from a court's dicta.

Plaintiff further argues at pages 15 and 16 of its brief that the various state courts are in conflict and for that reason a substantial federal question is presented. Plaintiff cites the following cases:

American Barge Line Co. v. Koontz, 136 W. Va. 747, 68 S.E. (2d) 56 (1951) (Measure of tax limited to intrastate commerce on barge line)

Norfolk & Western Railway Co. v. Field, 143 W. Va. 219, 100 S.E.(2d) 796 (1957) (Measure apparently permitted to include interstate commerce portion of railroad line)

Gartland S. S. Corp. v. Michigan Corporation & Securities Commission, 339 Mich. 661, 64 N.W.(2d) 886 (1954) (Interstate traffic excluded in measure of privilege tax)

Panhandle Eastern Pipeline Co. v. Michigan Corporation & Securities Commission, 346 Mich. 50, 77 N.W.(2d) 249 (1956) (Interstate traffic must be excluded in measure of privilege tax)

Duluth, South Shore & Atlantic Railroad Co. v. Michigan Corporation & Securities Commission, 353 Mich. 636, 92 N.W.(2d) 22 (1958); cert. den. 359 U.S. 310, 79 S. Ct. 876, 3 L. Ed.(2d) 831 (1959) (Interstate trackage of railroad included in measure of privilege tax)

National Schools v. Los Angeles, 135 Cal. App.(2d) 311, 289 P.(2d) 151 (1955); cert. den. 350 U.S. 968, 100 L. Ed. 841, 76 S. Ct. 439 (1956) (Privilege tax limited to income from intrastate business)

The three jurisdictions involved are West Virginia, Michigan and California. The earlier *American Barge Line Co.* case involved a statute which laid a tax on the privilege of engaging in intrastate commerce and also laid a tax on the privilege of engaging in interstate commerce. The court held that the latter tax could not be laid, that the statute was segregable and sustained the privilege tax laid on intrastate commerce. The court's conclusion is consistent with the rule laid down in the *Spector* case. Furthermore, the court noted, at page 58, that the taxpayer had no office or place of business located in West Virginia nor was any employe stationed in West Virginia. West Virginia's position is set out in the recent *Norfolk & Western Railway Co.* case which is somewhat similar to the facts presented here and the holding is the same as advocated by Oregon. It appears that where an imposition is properly laid, West Virginia measures its tax in a manner similar to Oregon.

The two earlier cases cited from Michigan are fully discussed in the later *Duluth, South Shore & Atlantic Railroad Co.* case. That case is on all fours with the case presented here. Michigan measures a tax properly imposed in a manner similar to Oregon.

In the *National Schools* case the City of Los Angeles levied an unapportioned gross receipts tax. The court concluded that if California were allowed to measure its tax by all receipts and other states in which the taxpayer did business would measure the tax by local receipts, the tax at the domicil is clearly seen to burden

interstate commerce in a way not equal to a tax on similar businesses operating wholly within the state. This decision is consistent with the decision of this Court in *Gwin, White and Prince, Inc. v. Henneford et al.*, 305 U.S. 434, 59 S. Ct. 325, 83 L. Ed. 272 (1938). Where the tax is properly imposed the measure can include all business within the state and California's position is clearly set forth in *Matson Nav. Co. v. State Board*, 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936), affirming 3 Cal.(2d) 1, 43 P.(2d) 805 (1935), where this Court held that California's privilege tax (equal to Oregon's) can be measured by net income from all sources of business done within the state, whether foreign, domestic or interstate.

It is thus seen that, contrary to plaintiff's contention, Oregon joins the cited trio of states to form a harmonious quartet.

CONCLUSION

The allocation formula (see Appendix A) employed by Oregon measures plaintiff's tax in the same manner it measures the tax of any other corporation doing business in Oregon, whether foreign or domestic. The cases presented demonstrate that a state's allocation formula for measuring a privilege tax properly imposed can constitutionally include both intrastate and interstate business done within the state in the measure. Oregon's tax need not be paid as a condition of doing business in

Oregon, it places no bar on interstate operations and is collected through ordinary means. Oregon's formula, as applied, can never reach income earned outside of Oregon so as to be violative of due process.

Oregon has granted plaintiff the privilege to do business in Oregon. Oregon has power to grant the privilege and plaintiff is exercising the privilege granted. The commerce clause, under the facts presented, requires that plaintiff not be given less favorable treatment by Oregon than is given local commerce. This Oregon has done under a formula which is demonstratively fair and reasonable.

It is respectfully submitted that the opinion of the Oregon Supreme Court be maintained and that the appeal of plaintiff herein be dismissed.

Respectfully submitted,

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APPENDIX A

Regulation 4.280(1)-(B) applicable to carriers of freight or passengers.

"*Modification of factors for carriers of freight or passengers.* A substantial portion of the net income of taxpayers engaged in the transportation of freight or passengers within and without Oregon results from the movement of revenue-producing equipment, drivers and other personnel. It is therefore necessary in calculating the apportionment factors of such carriers to reflect the results of the movement of such equipment and personnel through modification of the three factors by using revenue miles traveled both within and without the state. Thus, the apportionment formula of such transportation companies is to be computed as follows:

"(1) *Tangible property.* Fixed properties, such as buildings and land used in the business, shop equipment, cars and trucks used in gathering or delivering local freight, will be assigned to the state in which such properties are located. The value of trucks or other equipment used in over-the-road hauling or other transportation will be assigned to this state on a mileage basis. For example, if ten percent of a taxpayer's revenue miles are in Oregon, then ten percent of the value of the revenue-producing equipment will be included as part of the Oregon property factor.

"(2) *Salaries and wages.* The wages and salaries of employes assigned to fixed locations within this state

shall be included in the Oregon wage factor. The wages of personnel of over-the-road or other transportation equipment will be assigned to this state upon the basis of revenue miles. The wages of such personnel shall be apportioned to Oregon in the proportion that revenue miles traveled within this state bear to the total revenue miles traveled everywhere.

"(3) *Revenues or sales.* Revenues will be assigned to this state in the proportion that the revenue miles traveled within the state bear to the total revenue miles traveled everywhere."

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 521

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., a corporation,

Petitioner-Appellant,

vs.

SAMUEL B. STEWART, CARL CHAMBERS and RAY SMITH, constituting the State Tax Commission of the State of Oregon,

Defendants-Appellees.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

On Appeal from the Supreme Court of the State of Oregon.

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SAMUEL B. STEWART, CARL CHAMBERS and RAY SMITH, constituting the State Tax Commission of the State of Oregon,

Defendants-Appellees,

On Appeal from the Supreme Court of the State of Oregon.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

The record filed herein shows that the constitutional issues involving equal protection, due process and the Commerce Clause were raised by Appellant at the earliest possible opportunity, maintained throughout, and have never been waived (Jur. St. A2-A6). The decision in the trial court (Jur. St. A7-A11) rested on a finding of the invalidity of the tax statute as applied to Appellant under the Commerce Clause. Therefore, it was

unnecessary to discuss, in addition, the equal protection and due process arguments. Both of the latter matters were argued in the briefs before the Oregon Supreme Court although, for reasons unknown to Appellant, the Oregon Supreme Court failed to mention either of these contentions in its Opinion (Jur. St. A12 to A25).

SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED

A. The "Equal Protection" Clause.

As recently as 1959, this Court held, regarding the application of an ad valorem property tax between foreign and domestic taxpayers, that the taxpayer had standing to raise the constitutional issue. The case was heard on appeal, not by certiorari.

> Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527, 3 L. Ed. 2d 480, 485, 79 S. Ct. 437 (1959).

This Court further held that a state, in imposing excise taxes, is not required to resort to close distinctions or maintain a precise, scientific uniformity but stated:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' "

In the present appeal, the object of the legislation is the taxation by a privilege tax of the intrastate business of a motor vehicle common carrier. Where there are no local incidents in connection with the interstate

operations of the carrier, the application of an excise tax for the privilege of doing intrastate business upon *all* interstate business of the taxpayer within the state is a palpably arbitrary classification having no fair and substantial relation to the object of the legislation.

B. The "Due Process" Clause.

Appellees contend that due process of law asks only that the state have jurisdiction to tax and that the tax measure reach only income earned in Oregon (Mot 5). If the capable legal counsel for the State of Oregon believe that the foregoing represents the extent of due process protection in the field of state taxation of interstate commerce, then it would seem that the scope of due process protection in this field should be delineated by this Court upon this appeal.

It is true that this Court has recently limited its discussion of the application of the due process clause of the 14th Amendment in tax cases to the question as to whether or not due process is satisfied if a sufficient nexus is indicated between the taxing state and the taxpayer.

> Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 421 (1959).
>
> Scripto, Inc. v. Carson, 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960).

However, due process is also violated where the application of the tax statute is unreasonable and arbitrary, not fairly apportioned and there is not a reasonable and fair relationship between the application of the tax and the taxable privilege.

Hans Rees' Sons Inc. v. North Carolina, 283 U.S. 123, 75 L. Ed. 879, 51 S. Ct. 385 (1930).

Union Refrigerator Transit v. Kentucky, 199 U.S. 194, 26 S. Ct. 36, 50 L. Ed. 150 (1905).

Fargo v. Hart, 193 U.S. 490, 24 S. Ct. 498, 48 L. Ed. 761 (1904).

Ott v. Mississippi Valley Barge Line, 336 U.S. 169, 69 S. Ct. 432, 93 L. Ed. 585 (1949).

C. The "Commerce Clause."

The main thrust of this appeal is directed to the invalidity under the "Commerce Clause" of the application of the excise tax to appellant taxpayer by the appellees, who have raised these points in their motion to dismiss.

1. Conflict between the majority and minority opinions in the Spector case (Mot. 5).

The conflict in theory between the two majority and minority opinions is obvious from a reading of the portions quoted (Jur. St. 13, Mot. 5). The cases cited by appellees in support of their position either involve a different type of tax or a tax levied upon a local intrastate activity where receipts from interstate business in the particular circumstances were held to be a reasonable measure of the intrastate activity.

Matson Nav. Co. v. State Board (1936), 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (Tax on a domestic corporation for the exercising of corporate privileges within the state, a "franchise tax to be").

Memphis Natural Gas Co. v. Stone (1947), 335 U.S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (Mississippi franchise tax based on capital used within the state).

McGoldrick v. Berwind-White (1940), 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (Tax upon local delivery of goods for consumption within the taxing state; treated as analogous to a "use" tax).

Western Livestock v. Bureau (1937), 303 U.S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (Taxpayer operated a local printing business; value of local activity could be measured by receipts, including interstate receipts).

Ford Motor Co. v. Beauchamp (1939), 308 U.S. 331, 60 S. Ct. 273, 84 L. Ed. 304 (Franchise tax upon permanently located automobile assembly plants within the state; value of franchise could be measured by interstate receipts).

In the present case, appellant operated as a motor vehicle common carrier in intrastate commerce in Oregon and was subject to an excise tax for the privilege of doing this business. But appellant also conducted substantial operations in interstate commerce, its local business therein including only activities which have been declared by this Court not to be separable local incidents which may be made the basis for privilege taxation."

Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951).

Nevertheless, appellees have levied a privilege tax on *all* of appellant's business, both interstate and intrastate, although a recognized measure exists by which the tax can be levied only upon intrastate business and the tax made co-extensive with the privilege subject to taxation.

If the cases cited by appellees are distinguishable, then Spector Motor Service, supra, is in direct conflict

therewith and a substantial federal question is presented. If they are distinguishable, then the matter should be reviewed by this Court to clarify their application and to clarify the meaning of the Spector decision for the benefits of the parties here involved and other taxpayers and tax commissions with similar problems.

2. The "Measure" of the tax.

Appellees describe this appeal as involving the "measure" of the tax. In this regard, the so-called three factor test is not here involved despite the reference thereto on page 2 of appellee's motion. The regulation printed on pages 18 and 19 has no relevance to the facts in this appeal. However, even if it had been used, revenue miles still determine the allocation of other factors to Oregon which in turn determine the allocation of appellant's income to Oregon. The issue is not concerning the details of the measure but the fact that in the present case it obviously and patently has as its object the inclusion of all of appellant's interstate business within the State of Oregon.

The application of a state's privilege tax is limited by the commerce clause to intrastate commerce. Appellant's business is transportation of goods interstate and intrastate, the very essence of commerce. It performs no local activity nor are there local incidents separate and apart from the transportation. The State in imposing a privilege tax on its intrastate business used revenue (line-haul) miles in its allocation but included *all* miles traveled by appellant's trucks in both interstate and intrastate commerce within the state in levying the tax.

There is no attempt to limit the measure to intrastate commerce. When this occurs we are no longer considering a "measure" as such for the allocation formula clearly embraces an improper object of the privilege tax, namely, all of appellant's activity in interstate commerce. The result is, as stated by this Court in Gwin, White & Prince v. Henneford, 305 U.S. 434, 438, 83 L. Ed. 272, 275, 59 S. Ct. 325 (1938),

> " . . . that the tax, though nominally imposed upon Appellants' activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered, both within and without the state and burdens the commerce in direct proportion to its volume."

In this case, the measure patently purports to interdict all of appellant's interstate commerce within the State of Oregon, an application of the privilege tax statute held unconstitutional by this Court in Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 72 L. Ed. 833 (1951). Further, when interstate commerce reaches the state line of the State of Oregon, it then becomes subject to privilege taxation. To that extent, the application of its taxing statute urged by appellees burdens commerce without the state as well as within the state.

Appellees on pages 11 and 12 attempt to take advantage of a presumption of validity in their favor. There is a presumption of validity in favor of the state in the usual regulatory statute attacked on "due process" grounds. But when the "due process" clause is applied to state taxation, the presumption does not have equivalent validity. Freeman v. Hewitt, 329 U.S. 249, 253, 67 S. Ct. 274, 91 L. Ed. 265 (1946)

> " . . . attempts at such taxation have always bee more carefully scrutinized and more consistently r sisted than police power regulations of aspects such commerce."

Further, this same opinion holds that any interferen with interstate commerce by way of taxation is repugna to the commerce clause. There is no presumption validity of a state regulatory measure when it is cha lenged under the commerce clause. Whatever burde if any, of appellant is met when the measure on its fa includes all of appellant's activity in interstate commer within the taxing state.

3. Net Income Tax and Privilege Tax.

The Oregon Supreme Court erroneously equated tax on net income and a privilege tax measured by n income. Appellees describe this language as dictum. W disagree. It was one of the bases for its decision as ma be seen from the following quotation from the opinio of the Oregon Supreme Court (Jur. St. A19):

> "In the case here, v e think there is little to di tinguish the tax imposed by §110-1506, OCLA, an the Oregon income tax later imposed by the Co poration Income Tax of 1955. Oregon Laws 195 ch 334."

Thus, the Oregon Supreme Court attempts to draw sup port for its decision from Northwestern States Portlan Cement Co. v. Minnesota, 358 U.S. 450, 79 S. Ct. 35 3 L. Ed. 2d 421 (1959), which decision involved a ta on net income and not a privilege tax for the privileg of doing business within the state measured by net in come (See Jur. St., pages 17-19).

The best answer to contentions of appellees (I
14-16) concerning decisions from other states is a r
ing and analysis of the cases themselves to demonst
the conflicts therein.

CONCLUSION

If the decision of the Oregon Supreme Court in t
case is upheld, it will mean that states may tax
privilege of doing business in interstate commerce, e
though there are no local incidents in connection w
the interstate commerce which would otherwise exp
it to taxation. The privilege tax levied by appellees
viously and patently is applied to all interstate co
merce performed by appellant, even though accur
mileage records and a recognized means of apportio
ment permit the segregation of the two types of activi
For these reasons, the question here involved me
plenary consideration with briefs on the merits and o
argument.

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